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MAY 14 1963
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No. 779

In the

Supreme Court of the United States

October Term, 1962

RICHARD BOSTIC,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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INTRODUCTION

The Petitioner in his brief, at page (2), sets forth what purports to be two questions as the basis for this Court's jurisdiction. An analysis of these two statements would indicate that basically only one question is in issue. The sole issue is whether or not the Ohio courts, in their ruling, denied the Petitioner a fair and impartial trial as guaranteed under the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Petitioner, Richard Bostic, was indicted jointly with one Robert Wilkins by the Franklin County Grand Jury for the crimes of burglary, and attempt to force entrance into a depository box.

Robert Wilkins entered a plea of guilty to the indictment on November 4, 1960, and was sentenced to the Ohio Penitentiary according to law, the terms to be served consecutively, and ordered to pay court costs.

On May 2, 1961, after a two-day trial, a jury returned a verdict of guilty against Petitioner as to both counts in the indictment. The Court then sentenced Petitioner to the Ohio Penitentiary according to law, the terms to be served consecutively, and ordered the payment of court costs.

During this trial the evidence established that on the night of October 5, 1960, the Petitioner and Robert Wilkins went to 777 River Street, which is in the City of Columbus, Franklin County, and State of Ohio, and forcibly broke and entered the Hammond Food Company located at said address. After gaining entrance to the building, they forced their way into the office where the safe was located. They used a sledge hammer, crow bar and punch in an attempt to force entrance into the safe. These tools were recovered by the police at the scene. When the Petitioner was being slated into the city prison, after his arrest outside this building, he attempted to eat a piece of paper which was positively identified as being the sales slip from a hardware store for tools of the total value of the ones found at the scene. This appears in the Bill of Exceptions, pages 55 and 56.

The Columbus Police Department had been informed prior to October 5, 1960, that this particular establishment would be burglarized again, and in view of the fact that this place had been burglarized before on Wednesday, it

was "staked out" on this particular Wednesday, October 5, 1960. Therefore, after the Petitioner and Wilkins had gained entrance to the building and were attempting to open the safe, the police moved in.

Robert Wilkins was apprehended inside the building. The Petitioner, Bostic, was apprehended outside the building, but had been seen by a police officer prior to his apprehension inside the building when he stuck his head out of the window. This is verified in the Bill of Exceptions at page 32.

In addtion to the cash register receipt which was taken from the Petitioner at the time he was slated in at the city jail, his clothing was also taken from him and turned in to the crime laboratory. The chemist, by means of a vacuum cleaner, removed dust particles and debris from the Petitioner's trousers and made a comparison of said debris with known paint chips from the scene of the burglary, and testified that the paint chips found in the cuffs of the trousers worn by Petitioner on the night of the burglary were identical to paint chips removed from a door at the scene of the burglary. See Bill of Exceptions, pages 174 and 175.

ARGUMENT

The Petitioner contends that the constitutional guarantee of a fair trial implicit in the due process clause of the Fourteenth Amendment, and the applicable decisions of this Court demand the disclosure of the identity of the informer. This would appear to be the sole issue raised in this petition for writ of certiorari. The Petitioner, in the first instance, is relying on *In Re Murchison*, 349 U.S. 133, also 75 Supreme Court 623, 99 LED 942; *Massey v. Moore*, 348 U.S. 105, 75 Sup. Ct. 145, *Powell v. Alabama*, 287 U.S. 45, 77 LED 158, 53 Sup. Ct. 55; *Marcia v. Burke*, 197 F 2d 856; *Ex Parte Lee*, 123 F. Supp. 439; *McGarty v. O'Brien*, 96 F. Supp. 704. We contend that the Petitioner's constitutional guarantee of a fair trial was not denied by the court's ruling in spite of the ruling in *In Re Murchison*, because the facts in *In Re Murchison* are in no way similar or comparable to the facts in the case at bar. In the Petitioner's brief on page 9, he proceeds to set forth the following: "as to the question of when the privilege of non disclosure applies and when an exception should be made, no fixed rule is justifiable".

However, in referring to the above quotation from Petitioner's brief, we hasten to point out that they failed to further set forth the fact hat as taken from *Roviaro v. United States*, 353 U.S. 53, it is stated that the problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.

We might further point out that the facts in the *Roviaro* case are quite distinguishable from the facts in the instant case. In the *Roviaro case* the informer actually made a purchase from the defendant, and in order for the government to establish a portion of the essential elements of the crime charged it was necessary for them, the government, to introduce testimony of conversations between the informer and the defendant, but in this case, it never was, nor would it have been, necessary to introduce this type of testimony, as such testimony didn't even exist. The record discloses that the only reference to an informer was raised by the defendant who, by his persistent cross examination, indicated that he knew the identity of the informer. This fact is even emphasized in the Petitioner's brief at page 7, wherein he quotes from the Bill of Exceptions, his proffer of the testimony of the state's witness, Captain Sawyer of the Columbus Police Department:

> "Mr. Britt: I would like the record to show that if it had not been restricted upon cross examination of Captain Tom Sawyer of the Columbus Police Department, who was head of the Detective Bureau, that we would have been able to establish through his testimony and the records made in the ordinary course of conduct of the Police Department that the burglary in question was committed as induced by an officer of the Columbus Police Department *in conjunction with Jack Wilson who has been previously identified and will be further identified*, and that had he been required to testify, all the elements of entrapment would have been developed in cross examination of Captain Sawyer."

Therefore, the court's ruling which prevented the disclosure of the name of the informant was in no way a denial of the Petitioner's constitutional rights.

It very well should be noted at this point that any testimony which might have been elicited from the police officers

as to any conversation which they might have had with an informer would certainly have done violence to the hearsay rule, because said conversations would have been out of the presence of and the hearing of the Petitioner.

In the Petitioner's second division of his argument, he refers to and bases his contention upon the res gestae rule as an exception to the hearsay rule. The only indication throughout the entire record of the trial that the police department had any knowledge of a burglary was that they received an "anonymous tip". The record is completely silent as to any information as to time, method or manner, of the commission of said offense, as well as completely silent as to any participants in the offense. Also, it is completely silent as to when said anonymous tip was received by the police department. We believe that the Petitioner, in order to come within the res gestae, would have to have some evidence tending to show that said anonymous tip was reasonably close to the time of the commission of the offense.

In setting forth the basis for the application of the res gestae, Petitioner is relying on *Morgan v. The State*, 48 Ohio St. 371, paragraph 2 of the syllabus, which reads as follows:

> "Where one of several defendants jointly indicted for a felony is tried separately, and the prosecuting witness testifies in chief that the offense was committed by several persons acting together, and testifies to the identity of the defendant upon trial, it is proper, in cross examination, for the defense to inqure as to the identity of the other participants, and it is error for the court to refuse to permit such cross examination."

However, this particular case deals with the cross examination of the prosecuting witness as to the identity of co-defendants and in no way deals with the question of res

gestae, and we might add that as to a limitation of cross examination, this case does not apply to the facts; nor the argument as set forth by the Petitioner in the case at bar.

In order to be consistent with the theory of entrapment which the Petitioner attempted to introduce as a defense, we feel that the defendant would have to admit that he was induced to commit a crime by a law enforcement officer or his agent; however, the defendant, or Petitioner, testified that he was invited to go see a girl and indicated that he at no time knew that the other person was going to commit a burglary. See Bill of Exceptions, pages 226 through 229. Therefore, he cannot assert the defense of entrapment because, according to him, he knew nothing about a crime being committed, and in no way participated in the commission of the crime. We would urge that he must rely upon an outright defense of not guilty, or he must rely upon a defense which might be termed guilty, but not guilty by reason of entrapment. Otherwise, he is attempting to talk out of both sides of his mouth.

CONCLUSION

We believe that this case can best be summarized by referring to some excerpts from the key case in point, namely, *Roviaro v. United States.*

First, the *Roviaro case* was decided on federal statutes, not on rulings of state courts.

Second, we would urge the Court to strongly consider the language in *Roviaro v. United States*, 353 U.S. 53, at page 59, as follows:

> "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

And, finally, that portion of the above cited case, the dissenting opinion of Justice Clark, which reads:

> "In fact, a casual reading of the record paints a picture of one vainly engaging in trial tactics rather than searching for real defenses—shadowboxing with the prosecution in a baseless attempt to get a name that he already had but in reality hoping to get a reversible error that was nowhere else in sight. We should not encourage such tactics."

We, therefore, would urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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